

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Re: GN Docket No. 00-1 85 and CS Docket No. 02-52
Inquiry Concerning High-speed Access to the Internet Over Cable
and Other Facilities and Appropriate Regulatory Treatment for
Broadband Access to the Internet Over Cable

Notice of Ex Parte Presentation

Dear Ms. Dortch:

In its March 15, 2002 Declaratory Ruling in the above-referenced proceeding, the Commission asked for comments on, among other issues, whether it should forebear from regulating cable modem service. My name is Ken Swinehart and I am president of Amigo.net, a Colorado ISP. Amigo.net hereby submits this ex parte letter urging the Commission not to follow such a course. In December 2000, the Competitive Access Coalition, which included Amigo.net, filed extensive comments in Docket No. GN 00-185 in which the Coalition explained why cable modem service was a communications service subject to common carriage obligations under the Communications Act - a position that the Ninth Circuit just recently upheld in *Brand X Internet Services v. FCC*. The Coalition also pointed out that, in order to forebear from regulation the Commission would need to make express findings that regulation was unnecessary to prevent discrimination or to protect against the exercise of market power. The Coalition also pointed out why, under the governing statutory standards, there was no remotely legitimate basis to forebear from regulating cable modem service. The Coalition's comments are as valid today as when the original Notice of Inquiry issued more than two and a half years ago and Amigo.net incorporates those comments here.

If anything, the concerns expressed by the Competitive Access Coalition are even more critical today. In the March 15 Declaratory Order issued concurrently with the NPRM, the Commission itself has found (1) that cable's market share of the broadband platform is nearly 70 percent and rising and (2) that that cable companies do not offer cable modem service voluntarily on a non-discriminatory basis. In other words, without regulation they will continue to discriminate, undercutting the prerequisite for forbearance. Nothing has changed since March 2002 either. On the contrary, denied access to a broadband platform, many of the companies belonging to the Coalition only two years ago are no longer in business. As the Commission itself noted in *In Re Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access...*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722 Par. 123 (2003), the broadband internet market is "very highly concentrated" and broadly available alternatives to DSL and cable are "years away." The Commission

should not continue to place a blind eye to the harm its policy of de facto forbearance continues to wreak while it cogitates over whether to forbear legally. There is no lawful case for forbearance and we urge the Commission to say so before still more competition for cable-run ISPs disappears.

Pursuant to sections 1.1206(b)(1) and (2) of the Commission's rules, a copy of this letter and attachment is being filed electronically with the Office of the Secretary. Any questions concerning this submission should be addressed to the undersigned.

Respectfully submitted,

Ken Swinehart